Supreme Court, U.S.
FILED
APR 11 1995
OFFICE OF THE CLERK

No. 94-1423

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JOHN E. PELOZA,

Petitioner,

v.

CAPISTRANO UNIFIED SCHOOL DISTRICT, *et al.*,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

KEITH A. FOURNIER
The American Center for Law & Justice
1000 Regent Univ. Drive
Virginia Beach, VA 23467
(804) 579-2489

WENDELL R. BIRD
DAVID J. MYERS
Bird & Myers, P.C.
1150 Monarch Plaza
3414 Peachtree Road, NE
Atlanta, GA 30326
(404) 264-9400

JAY ALAN SEKULOW *
JAMES M. HENDERSON, SR.
JOEL H. THORNTON
The American Center for Law & Justice
1000 Thos. Jefferson St.
Suite 520
Washington, DC 20007
(202) 337-2273

CYRUS ZAL
Law Offices of Cyrus Zal
102 Mainsail Court
Folsom, CA 95630
(916) 985-3576

* *Counsel of Record*

Attorneys for Petitioner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii
INTRODUCTION 1
REPLY ARGUMENT 2

I. *TINKER* EMPLOYS A STANDARD MORE DEFERENTIAL TO SPEECH THAN *PICKERING* ... 2

II. *HAZELWOOD* DOES NOT SUPPORT THE BAN ON ANSWERING STUDENTS' QUESTIONS 5

II. THE TRIAL COURT ERRED IN ITS RULING ON THE RULE 12(B)(6) MOTION, BECAUSE IT CONSIDERED MATERIALS OUTSIDE THE PLEADINGS BUT FAILED TO CONVERT THE MOTION TO ONE FOR SUMMARY JUDGMENT ... 8

CONCLUSION .....

TABLE OF AUTHORITIES

Page(s)

Cases

Abington School District v. Schempp, 374 U.S. 203 (1963) 1
Bishop v. Aronov, 926 F.2d 1066 (11th Cir. 1991) 3
Board of Education v. Mergens, 490 U.S. 2262 (1990) 2
Capitol Square Review and Advisory Board v. Pinette, Docket No. 94-780, *review granted*, 63 U.S.L.W. 3537 (Jan. 13, 1995) 10
Carter v. Stanton, 405 U.S. 669 (1972) 9
Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988) 5, 6, 8
Lee v. Weisman, 120 L.Ed.2d 467 (1992) 8
Miles v. Denver Public School, 944 F.2d 773 (10th Cir. 1991) 3
Minarcini v. Strongsville City School Dist., 541 F.2d 577 (6th Cir. 1976) 2
Peloza v. Capistrano Unified School Dist., 37 F.3d 517 (9th Cir. 1994) 1, 2-3
Pickering v. Board of Education, 391 U.S. 563 (1968) . 2, 4, 5
Rosenberger v. Rector and Visitors of the University of Virginia, Docket No. 94-329, *review granted*, 63 U.S.L.W. 6346 (Oct. 31, 1994) 10
Tinker v. Des Moines Indep. Community School District, 393 U.S. 503 (1969) 2, 4, 5, 6
Ward v. Hickey, 996 F.2d 448 (1st Cir. 1993) 3
Zykan v. Warsaw, 631 F.2d 1300 (7th Cir. 1980) 2

TABLE OF AUTHORITIES—Continued

Page(s)

Constitutional Provisions, Statutes, Rules

Fed. Rule Civ. P. 12(b)(6) ..... 1, *passim*

Fed. Rule Civ. P. 56 ..... 7, 9

Other Authorities

ROTUNDA & NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE & PROCEDURE, 2nd ed. (1992) 1

INTRODUCTION

This petition seeks review of a judgment of the United States Court of Appeals for the Ninth Circuit, affirming a Rule 12(b)(6) dismissal of Petitioner's federal civil rights complaint. In their Brief in Opposition to the Petition (hereafter "Resp. Br."), Respondents proceed oblivious to the rule that, on a Rule 12(b)(6) motion, the court should have taken as true the well-pled facts of the complaint. Resp. Br. at 2-3 (setting forth various allegations not found in the complaint). Instead, Respondents assert, as though preclusive, facts not found in the pleadings, in their post-*hoc* justification of the 12(b)(6) dismissal.

An unseemly notion pervades Respondents' neat phrasing and argumentation. That ugly idea is that suppression of religion, even factual discussions about it, is an obligation of good government. Compare Resp. Br. at 11-13 (reflecting Respondents' view) with *Peloza v. Capistrano Unified School Dist.*, 37 F.3d 517, 522 (9th Cir. 1994), Pet.App. 47a (the ban on answering questions about religion "is a restriction on [Peloza's] right of free speech"). But this Court has never interpreted the Religion Clauses as requiring a relentless extirpation of religion from public schools. Rather, this Court has suggested that "one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization." *Abington School District v. Schempp*, 374 U.S. 203, 225 (1963).[1]

---

1 One commentator has suggested that this Court found that the exclusion of certain topics from classroom discussion was improper because that action gave assistance to the religious point of view. *See* ROTUNDA & NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE & PROCEDURE, 2nd ed. § 21.5 at 513 (1992). Here, likewise, the exclusion of certain topics from school day discussion is improper, not because such exclusions advance religion, but because

Nonetheless, Respondents insist that Peloza be silenced. Respondents fail to comprehend the principle that the government does not endorse all it fails to censor. *Board of Education v. Mergens*, 490 U.S. 226, 250 (1990). In *Mergens*, this Court rejected such "perceived endorsement" arguments. Here, no facts have been alleged or exist in the record to support Respondents' assertions of "perceived endorsement." Hence, this Court should ignore the Respondents' siren song.

REPLY ARGUMENT

I. *TINKER* EMPLOYS A STANDARD MORE DEFERENTIAL TO SPEECH THAN *PICKERING*

Respondents err in concluding that "*Pickering* and *Tinker* are . . . entirely consistent." Resp. Br. at 14. The two cases approach the right to free speech from different levels of deference. Because *Tinker* is more deferential to speech than *Pickering*, it takes no imagination to see how expression protected under *Tinker* would suffer under *Pickering*.[2]

---

such exclusions hinder religion and demonstrate, not neutrality, but hostility toward religion and its adherents.

2 Respondents' effort to sweep the real and substantial conflict in the circuits under the rug is unavailing. They assert that neither *Zykan v. Warsaw*, 631 F.2d 1300 (7th Cir. 1980) nor *Minarcini v. Strongsville City School Dist.*, 541 F.2d 577 (6th Cir. 1976) "involve teacher rights to speech . . . ." Resp. Br. at 15 n.5. To the contrary of Respondents' assertion, however, are the actual texts of those two cases. *See Zykan*, 631 F.2d at 1302 ("a final set of allegations concerns defendants' decision not to rehire English teacher Teresa Burnau and another teacher"); *Minarcini*, 541 F.2d at 579 (case arose after a school board "issued resolutions which served to prohibit teacher and student discussions of [certain] books in class").

Take, for example, Judge Poole's illustration, in his dissenting opinion in the Ninth Circuit below:

> For example, a student might come to a teacher during lunch and ask about Malcolm X or Martin Luther King's religious beliefs, and how and why they evolved, or about the origins of Islam, or what the seven great religionsof the

---

Respondents take three decisions, *Ward v. Hickey*, 996 F.2d 448 (1st Cir. 1993), *Miles v. Denver Public School*, 944 F.2d 773 (10th Cir. 1991), *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991), and assert that those decisions "conclude that the issue [here] is one of limitations which are reasonably related to pedagogical concerns." Resp. Br. at 15 n.5. But those three decisions, which address restrictions on the *in-class* discussions by teachers, are not conclusive here, where Respondents broadly and sweepingly silenced Peloza throughout the school day and across the campus.

Cf. Ward, 996 F.2d at 452 ("public schools may limit classroom speech to promote education goals. . . . [W]e find that a school committee may regulate a teacher's classroom speech"); *Miles*, 944 F.2d at 777 ("[t]hese responsibilities warrant application of the standard adopted in *Hazelwood* for reviewing regulation of classroom speech"); *Bishop*, 926 F.2d at 1073 ("[h]ence, where the in-class speech of a teacher is concerned, the school has an interest . . . in scrutinizing expression that 'the public might reasonably perceive to bear [its] imprimatur'") (citation omitted).

The conflict exists. Respondents make much of the fact that many decisions cited in the Petition do not involve religious speech. That fact is not in dispute. Respondents are very comfortable with having different tests for the right to freedom of speech, depending on the content or subject matter. Their comfort with an official policy excluding all discussions *about* religion is not decisive, unless their premise — that religion is to be feared, silenced and avoided — is well-taken. This Court's decisions are to the contrary.

world were.

Pet. App. at 53a. If a teacher answered these questions *objectively*, that is to say, with factual information, a school district could not prohibit that communication under the *Tinker* standard. In *Tinker v. Des Moines Indep. Community School District*, 393 U.S. 503 (1969), this Court held that neither teachers nor students "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.*, 393 U.S. at 506. On that general principle, this Court held that restrictions on speech in public schools are valid only where it is shown that the speech causes a substantial interference with the educational mission of the school or substantially interferes with the rights of others. *Id.*, 393 U.S. at 509.

If this Court remains true to *Tinker*, then it seems clear that the communication—from teacher to student—of factual information, such as listing the key points in the spiritual life of Malcolm X, which cannot be predicted reasonably to cause a material and substantial disruption of the school's education mission or to substantially interfere with the rights of others, must be tolerated (if not encouraged).

Tinker's promise is that a school cannot, consistent with the Constitution, interfere with a teacher's objective listing of the "world's seven great religions." In circumstances where no endorsement of religion occurs or coercion of adherence is threatened, *Tinker*'s counsel would be to refrain from interfering with the right to freedom of speech. But such a deferential swath would not be cut, around such speech by a teacher, under *Pickering*.

In *Pickering v. Board of Education*, 391 U.S. 563 (1968), this Court, noting that schools have enhanced interests in regulating their employees' speech, analyzed an alleged

violation of a public employee's rights in two-steps. First, this Court considered whether the employee's speech addressed a matter of public concern. *Id.* at 572-73. In *Pickering*, this Court concluded that the speech addressed an issue of public concern. Second, this Court held that the government had to prove that the employee would have lost the job notwithstanding the speech. *Id.* at 573-75.

Consequently, every time a teacher's right to speak is brought into question, under *Pickering*, the initial question is not whether a material and substantial disruption of school order has been threatened. Rather, the first question becomes whether the matter addressed by the teacher is one of public concern. 391 U.S. at 572-73. It becomes irrelevant, then, whether any disruption occurred or was threatened. Instead, first school officials and board members and then courts will cogitate whether a discussion, say of Malcolm X, addressed matters of public concern.

Plainly, *Tinker* provides greater solicitude toward speech. Consequently, the Respondents err in concluding that it makes no difference which standard is applied. If the Respondents' believe that it makes no difference which standard is applied, then they should not object to a remand directing the lower courts to apply the *Tinker* standard to this case.

II. *HAZELWOOD* DOES NOT SUPPORT THE BAN ON ANSWERING STUDENTS' QUESTIONS

Respondents argue that the order, barring Peloza from answering students' questions about religion, was justified to "insure that a subsidized teacher is not inculcating religion," Resp. Br. at 13, and that taking such a step reflected Respondents' obedient response to this Court's decision in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988).

Respondents' assertion is not supported by *Hazelwood*.

In *Hazelwood*, this Court was confronted with a claim that a school district's actions, deleting from a school newspaper two pages which contained articles discussing the impact of divorce on students and discussing certain students' experiences with pregnancy. 484 U.S. at 263. The newspaper, *Spectrum*, "was written and edited by the Journalism II class at Hazelwood East." 484 U.S. at 262. School board funds were allocated for publication of *Spectrum*, and a faculty member, on salary, supervised the production of the newspaper, which was submitted to the school principal for review prior to publication. 484 U.S. at 262-63. The litigation followed a decision by the principal to withhold two pages of one issue from publication, because of concerns about content and fairness. *Id.*

The trial court "concluded that school officials [could] impose restraints on students' speech in activities that are an integral part of the school's educational function — including the publication of a school-sponsored newspaper by a journalism class — so long as the decision ha[d] a substantial and reasonable basis." 484 U.S. at 264 (internal quotation marks and citation omitted). On appeal, the eighth circuit reversed, on the theory that *Spectrum* was a public forum for student speech, which status "precluded school officials from censoring [*Spectrum*'s] contents . . . ." 484 U.S. at 265.

This Court granted certiorari and reversed the judgment of the eighth circuit. 484 U.S. at 266. First, this Court considered and rejected the conclusion of the Eighth Circuit that *Spectrum* constituted a public forum of any sort. 484 U.S. at 267-70. Then, this Court turned to the task of distinguishing *Hazelwood* from *Tinker v. Des Moines Indep. School District*, 393 U.S. 503 (1969). This Court noted:

> The question whether the First Amendment requires a school to tolerate particular student speech — the question [this Court] addressed in *Tinker* — is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.

484 U.S. at 271.

Respondents contend that the directive *never* to answer student questions about religion, whether Peloza is on the playing field, in the cafeteria or elsewhere on campus during authorized hours, is justified because "the public might reasonably perceive" that Peloza's answers "bear the imprimatur of the school." But, the posture of this case denies to Respondents any benefit from that argument. This petition arises from a judgment of the ninth circuit affirming a Rule 12(b)(6) dismissal. *See Peloza v. Capistrano Unified School Dist.*, 37 F.3d 517 (9th Cir. 1994), Pet. App. at 38a *et seq.*[3] The facts before the trial court were those well-pled facts contained in the pleadings, *viz.*, the Complaint. Those facts do not support the conclusions reached by Respondents in their brief at 9-13.

---

3 If, as Respondents apparently believe, the district court converted their Rule 12(b)(6) motion for dismissal to a Rule 56 summary judgment motion, then the district court erred in failing to give notice of its determination to do so and an opportunity to respond. *See* Arg. III, *infra*.

Respondents' leap to judgment cannot be made the basis for a conclusion that the "no questions answered" directive regulates only such speech by Peloza as "the public might reasonably perceive to bear the imprimatur of the school." That condusion cannot be supported by the facts alleged in the Complaint. Pet. App. at 58a-77a.

But Respondents' incantation of *Hazelwood* suffers from another, more fundamental difficulty. Peloza has not argued that the Respondents must *sponsor* his speech, or that there are no times and no places where appropriate regulations could be imposed on him. Rather, Peloza has asserted only that the issues presented by the *shut up* directive have to do with toleration of speech, not sponsorship. *Toleration* of religion, of course, is a matter about which this Court has expressed its sensitivity. *See, e.g., Lee v. Weisman*, 120 L.Ed.2d 467, 488 (1992) ("there will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students. ... [T]hese matters, often questions of accommodation of religion, are not before us"). Respondents' problem is that, when faced with an opportunity to demonstrate sensitivity and toleration to religion, they imposed a rule of silence about religion. *Hazelwood* did not require Respondents to act as they did, and Respondents err in their conclusion to the contrary.

II. THE TRIAL COURT ERRED IN ITS RULING ON THE RULE 12(B)(6) MOTION, BECAUSE IT CONSIDERED MATERIALS OUTSIDE THE PLEADINGS BUT FAILED TO CONVERT THE MOTION TO ONE FOR SUMMARY JUDGMENT.

Respondents urge that the judgment below was "appropriate," in light of documents judicially noticed. Resp. Br. at 17-19. But the trial court erred in considering the

documents lodged below by Respondents on the motion to dismiss. The trial court should have converted the motion to a Rule 56 motion, with notice and an opportunity to appropriately brief and present evidence on the converted motion.[4] To have done otherwise was clear error, as this Court has held.

In *Carter v. Stanton*, 405 U.S. 669 (1972) (per curiam), this Court vacated and remanded the judgment of a three-judge district court. *Id.* The district court had dismissed a complaint challenging a state welfare eligibility regulation after it "received evidence upon which to resolve the matter." 405 U.S. at 670. Discussing that point, this Court noted, "it appears that . . . matters outside the pleadings were presented and not excluded by the court. *The court was therefore required by Rule 12(b) . . to treat the motion as one for summary judgment* and to dispose of it as provided in Rule 56." 405 U.S. at 671 (emphasis added). Here, however, the trial court considered the extraneous materials but failed to convert the 12(b)(6) motion to one for summary judgment pursuant to Rule 56.

Respondents' assertion that the judgment was appropriate in light of documents lodged by Respondents and judicially noticed by the court is wrong. The court below erred: it considered extraneous materials, but failed to comply with the requirement of the Federal Rules of Civil Procedure. Respondents' argument is not well-taken.

---

4 The trial court could have been granted leave to the Petitioner to amend his Complaint, which he specifically requested. *See*, Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss at 24 (filed Dec. 23, 1991); Transcript of Hearing on Motion to Dismiss at 30 (hearing held Jan. 6, 1992).

CONCLUSION

The petition should be held pending this Court's decisions in *Rosenberger v. Rector and Visitors of the University of Virginia*, Docket No. 94-329, *review granted*, 63 U.S.L.W. 6346 (Oct. 31, 1994) and *Capitol Square Review and Advisory Board v. Pinette*, Docket No. 94-780, *review granted*, 63 U.S.L.W. 3537 (Jan. 13, 1995). After those decisions are rendered, the Court should grant the petition, vacate the judgment below, and remand for further consideration in light of those decisions. In the alternative, this Court should grant this petition and set the case for plenary review.

Respectfully submitted,

KEITH A. FOURNIER
The American Center for
Law & Justice
1000 Regent Univ. Drive
Virginia Beach, VA 23467
(804) 579-2489

WENDELL R. BIRD
DAVID J. MYERS
Bird & Myers
1150 Monarch Plaza
3414 Peachtree Road, NE
Atlanta, GA 30326
(404) 264-9400

JAY ALAN SEKULOW *
JAMES M. HENDERSON, SR.
JOEL H. THORNTON
The American Center for
Law & Justice
1000 Thos. Jefferson St.
Suite 520
Washington, DC 20007
(202) 337-2273

CYRUS ZAL
Law Offices of Cyrus Zal
102 Mainsail Court
Folsom, CA 95630
(916) 985-3576

* *Counsel of Record*

Attorneys for Petitioner

April 11, 1995.